

STATE OF COLORADO FISCAL RULES

CHAPTER 3: CONTRACTS

| <u>FISCAL RULE</u> | <u>NUMBER</u> |
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STATE OF COLORADO FISCAL RULES

Rule 3-1 STATE CONTRACTS

AUTHORITY:

Article V, Section 33, Constitution of Colorado
Article XII, Section 13 (2), Constitution of Colorado
Governor's Executive Order, signed October 1, 1977
Governor's Executive Order, signed April 7, 1978
2-2-320(2), C.R.S. (Attorney General Contract Approval)
24-30-903(d), C.R.S. (Telecommunications Contract Approval)
24-30-1104(1)(h), C.R.S. (Central Service Contract Approval)
24-30-1107, C.R.S. (Central Services Contracts)
24-30-1303(1)(a), C.R.S. (State Buildings Contract Approval)
24-31-101, C.R.S. (Attorney General - Legal Advisor)
24-30-202, C.R.S. (State Controller Authority)

DEFINITIONS:

Advance Payment - A payment that is made prior to the receipt of goods or services.

Commitment Voucher - A purchase order, a state contract, an approved travel authorization, an advice of employment, or any other document appropriate to the transaction, prescribed by the State Controller, which creates a financial obligation to the state that ultimately results in a disbursement of funds by the state.

Employee/Employer - A relationship of employer and employee exists when the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished, but also the details and means by which that result is accomplished. It is not necessary that the employer actually direct or control the manner in which the services are performed, it is sufficient that the employer has the right to do so. The right to discharge is also an important factor, indicating that the person possessing that right is an employer. Other factors characteristic of an employer, but not necessarily present in every case, are the furnishing of tools and equipment, and a place to work to the individual who performs the services.

Independent Contractor - An independent contractor relationship exists when the firm or individual is responsible to the state for the results of certain work but is not subject to the state's control as to the means and methods of accomplishing those results. Further, an independent contractor generally:

- A. Has a place of business and a business listing in a directory when the services are offered to the public.
- B. Selects the clients and is free to work for one or more during any given period of time.
- C. Determines the time and place where work shall be performed.
- D. Provides the tools and materials needed to perform the work.
- E. Does not participate directly or indirectly in benefit programs of the state. For example, the individual is not covered by the state for Worker's Compensation covering injury to the worker, for public liability covering injury to others, or for unemployment compensation.
- F. May agree to perform specific services for a fixed price and generally does not receive regular amounts at stated intervals.

Interagency Contracts - Formal legally binding agreements between two principal state agencies and/or institutions of higher education are state contracts as defined in this fiscal rule and shall be subject to the provisions and requirements of this fiscal rule.

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Personal Service Contracts - Service or benefit purchased by the state where the state is to receive direct benefit. Individuals or firms performing these services are considered independent contractors and are not considered employees of the state.

State Contract - A formal legally binding agreement between two state agencies and/or institutions of higher education or one state agency or institution of higher education and another party or an amendment to such agreement, which ultimately results in the disbursement of funds. For the purpose of this fiscal rule, state contracts include, but are not limited to, outsource contracts, personal service contracts, purchased service contracts, and settlement agreements. State contracts, as used in this fiscal rule, do not include purchase orders.

Outsource Contracts - A formal legally binding agreement between a state agency or institution of higher education and another party or an amendment to such agreement whereby the state agency or institution of higher education agrees to allow the contracting party to perform a function, normally performed by the state agency or institution of higher education. Outsource contracts usually do not require a disbursement of state funds. An example of an outsource contract is a state agency or institution of higher education contracting with another party to issue a state license. State contracts that divert revenues due the state are not considered outsource contracts and are subject to State Controller approval.

Purchased Service Contracts - Service or benefit purchased by the state for a third party. An example is medical services received by a third party through a state contract between a medical care provider and the Department of Health Care Policy and Financing. Individuals or firms performing these services are considered independent contractors and are not considered employees of the state.

Purchase Order - A document prepared and signed by an authorized employee of a state agency or institution of higher education for the purpose of encumbering funds and securing goods or services from a vendor. For the purpose of this fiscal rule, a purchase order is not considered a state contract.

Settlement Agreements - Formal legally binding state contracts between two or more parties for the purpose of ratifying decisions reached concerning employment or contractual disputes.

RULE:

Each state agency or institution of higher education is responsible for assuring that the state contracts they initiate are within the intent of the appropriation and that the state contract is necessary and is the most economical and efficient means for accomplishing the identified tasks.

Each state agency or institution of higher education is responsible for assuring that all constitutional and statutory requirements have been met prior to signing a state contract.

Accepted business practices generally do not allow for any advance payments of financial obligations. State contracts and other commitment vouchers shall not provide for advance payment for goods and or services, unless it is an established industry standard or unless the advance payment provides a benefit to the state equal to the cost and risk of the payment. Any advance payment made pursuant to the terms of a state contract requires the written approval of the State Controller, or a delegate, authorized by the State Controller to approve advance payments except in the following instances:

- Annual payments for maintenance of office equipment or for IT maintenance (software and hardware, IT service agreements (including Internet access, systems and database access), software licenses;
- Federal grants awarded by the state to a subgrantee;
- Payments for entertainers, speakers, training, class tuition and fees, conference registrations or for seminars;

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- Payments included in inter-agency contracts;
- Payments for construction permits;
- Post office box rentals;
- Membership dues;
- Easements in perpetuity if the complete rights are transferred upon payment;
- Insurance premiums;
- Licenses;
- Subscriptions;
- Maintenance agreements

Use of State Contracts

A State agency or institution of higher education shall negotiate and process a state contract when:

- .01 Acquiring personal services costing over \$50,000, including maintenance and service agreements.
- .02 Leasing or entering into a license involving payment by the State for the use of land, buildings, or other office or meeting space when the term is for more than thirty days.
- .03 Acquiring architectural services, engineering services, land surveying, industrial hygienist services, and landscape architectural services.
- .04 Expending capital construction, controlled maintenance, and/or emergency maintenance project funds in excess of \$50,000, except as otherwise provided in Fiscal Rule 4-1. Purchases of fixed equipment that do not require installation services may be purchased with a state purchase order.
- .05 Protecting the interest of the state may only be accomplished by using a state contract because other commitment vouchers are not considered sufficient to adequately protect the state. When questions arise in this area the State Controller's office or the Attorney General's office should be contacted for assistance.

State Contract Form and Provisions

- .01 State contract form
 - A. All state contracts, including leases, shall be prepared on standard letter size paper, 8 1/2" X 11".
 - B. All state contracts shall be in a form approved by the State Controller.
 - C. All state leases and licenses of real property shall be in a form approved by the State Controller. All state leases and licenses shall contain both the State Controller's approval condition (Special Provision Number 1) and the funds availability clause (Special Provision Number 2) found in Appendix A to this chapter of the state fiscal rules. All state leases shall contain clauses specifying cancellation requirements where the premises are destroyed by fire and/or where the premises are subject to eminent domain.
- .02 State contract provisions
 - A. All state contracts, except leases and interagency agreements, shall contain the applicable Special Provisions found in Appendix A or Appendix B to this chapter of the state fiscal rules.
 - B. All State contracts for purchased services or those state contracts where a maximum contract amount cannot be readily determined, shall contain the following provisions:

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"Payment pursuant to this Contract shall be made as earned, in whole or in part, from available State funds in an amount not to exceed \$_____ for the purchase of _____.

Multiple fiscal year contracts shall also contain the following provision:

It is further understood and agreed that the maximum amount of State funds available for fiscal year _____ for the purchase of _____ is \$_____. The liability of the State, at any time, for such payments shall be limited to the unexpended amount remaining of such funds."

In addition, state agencies and institutions of higher education using this provision shall also request an encumbrance waiver from the State Controller.

- C. All state contracts involving federal funds shall include the following provision:

"This Contract is subject to and contingent upon the continuing availability of Federal funds for the purposes hereof."

- D. All state contracts for the lease, easement, right-of-way or disposal of state property located in a flood plain to any non-state, public or private party, shall reference in the conveyance: those uses that are restricted under identified federal, state or local flood plain regulations; those appropriate restrictions to the use of properties by the grantee or purchaser and any successors, except where prohibited by law; or withhold such properties from conveyance.
- E. All state contracts shall contain a specific termination date, an event from which such date may be determined, or a provision for termination when determined by the state to be in its best interest.

State Contract Approvals

The chief executive officer, or a delegate, of a state agency or institution of higher education shall sign all state contracts on behalf of the state agency or institution of higher education.

It shall be the responsibility of the contracting state agency or institution of higher education to obtain all required approvals. Approvals of certain state agencies and institutions of higher education are required by statute, executive order, or fiscal rule depending on the subject matter of the state contract. Proof of all required signatures indicating the approval of state agencies and institutions of higher education shall be retained by the contracting state agency or institution of higher education. State contracts requiring approvals include:

- .01 Service contracts require the approval of the State Personnel Director.
- .02 Construction contracts and controlled maintenance contracts require the approval of the State Buildings Director, or a delegate, unless otherwise exempted by statute.
- .03 Real property contracts, including leases, easements, and rights of way contracts, require the approval of the Director of the Real Estate Program or a delegate, unless otherwise exempted by statute. Excluded from this requirement are those real properties administered by the State Board of Land Commissioners and the Department of Transportation.
- .04 Communication system contracts involving telephone, radio, microwave, tale-type, closed circuit television, automated data processing communications systems require the approval of the State Communications Coordinator, or a delegate.

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- .05 Legal and paralegal service contracts require the approval of the Attorney General's Office.
- .06 Centralized service contracts require the approval of the Director of the Division of Central Services, or a delegate, for all state agencies within the counties of Adams, Arapahoe, and Jefferson and the city and county of Denver. Examples include state contracts for the acquisition of the following: motor pool operation, motor vehicle maintenance, mail or messenger services, office copying, graphic design for print media, printing and binding, microfilming, or design of management forms.
- .07 Debt collection service contracts require the approval of the State Controller, or a delegate.
- .08 State agency or institution of higher education financial systems used to record their financial transactions and financial information and to develop their financial reports and prepare their financial statements shall be approved by the State Controller, or a delegate.

All state contracts shall be executed by the State Controller or by an individual delegated to execute state contracts by the State Controller. If an attempt is made to execute a State Contract without the approval of the State Controller, or a delegate, the state contract shall be null and void and not binding against the state. However, every person involved in incurring the obligation shall be jointly and severally liable for the obligation.

State Contract Legal Review

All state contracts shall be reviewed by the Attorney General's office except for interagency contracts and those state contracts for which the State Controller has designated in writing an attorney, employed by the state agency or institution of higher education and authorized by the State Attorney General, to perform the required legal review. If the state agency or institution of higher education's legal review raises a question concerning the legality of the state contract, the question shall be referred to the Attorney General's Office.

Review by the Attorney General's Office or an attorney delegated by the State Controller shall include the following:

- .01 Compliance with the Colorado Constitution, state statutes, regulations, and executive orders.
- .02 Authority of the contracting state agency or institution of higher education.

The Attorney General review may also include:

- .03 Risk analysis, including appropriate terms and conditions.
- .04 Conformity between the RFP or IFB and final contract, as appropriate.
- .05 Vendor compliance with all preconditions to the contract, as appropriate.

If during the course of the legal review a question should arise as to state contract language that cannot be resolved, it shall be referred to the State Controller together with a memorandum detailing the unresolved issue for resolution. A copy of the memorandum shall also be sent to the principal contracting state agency or institution of higher education.

Outsource contracts shall be reviewed by the state Attorney General, or a delegate, but need not be signed and executed by the State Controller, or a delegate, unless the state contract requires an expenditure of state funds or the Attorney General identifies an issue concerning the expenditure or potential expenditure of state funds.

Review and Approval by the State Controller

Upon receipt of a state contract, the State Controller, or a delegate, shall review the state contract for completeness and ensure that funds are available to cover the state contract liability.

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Upon approval, the state contract shall be executed by affixing the signature of the State Controller, or a delegate.

Under certain circumstances the State Controller may delegate in writing authority to execute state contracts. Delegation of the State Controller's signature authority does not eliminate the requirement that all state contracts have a legal review or exempt any state agency or institution of higher education from securing the required state contract approvals, as provided in the state contracts approval section of this fiscal rule.

Interagency Contracts

Interagency contracts require approval of the State Controller, or a delegate, unless the state agency or institution of higher education disbursing the funds has been delegated State Contract signature authority by the State Controller. Interagency contracts shall, at a minimum, include the following provisions:

- .01 Identification of parties to the state contract;
- .02 Appropriation authority, including fund, state agency or institution of higher education, appropriation code, and encumbrance number;
- .03 Scope of work;
- .04 Statement of consideration, (if applicable);
- .05 Payment and other performance; and
- .06 Definition of breach and remedies (shall be consistent with Fiscal Rule 2-6).

Employee/Employer or Independent Contractor

Careful distinction shall be made between work that should be accomplished by persons who are employees of the state and work that may be accomplished by individuals or firms on a personal services contract. The responsibilities and obligations of the state differ between employee/employer arrangements and agreements with independent contractors. The state has a third party liability for the acts of its employees, whereas independent contractors are liable for their own actions. The status should be carefully considered and cases of doubt generally resolved in favor of the employee classification. An erroneous classification as an independent contractor may result in serious penalty to the state for failure to deduct applicable taxes.

EXCEPTIONS TO RULE:

Excluded from the provision of this fiscal rule are:

- .01 Contracts that do not provide for the disbursement of funds, with the exception of outsource contracts and contracts that divert revenues due the state.
- .02 State contracts for personal services exempted from the state personnel system by the Colorado Constitution and paid through an authorized state payroll system. Examples include appointees by the Governor and Lieutenant Governor and their administrative staffs, members of boards or commissions, faculty members of educational institutions, attorneys at law serving as assistant attorneys general, and employees of the Legislative and Judicial Departments of the state. These state contracts are considered to be advises of employment and, therefore, are not covered by this fiscal rule.

SPECIAL PROVISIONS

(Not for Use with Inter-Governmental Contracts)

1. CONTROLLER'S APPROVAL. CRS 24-30-202 (1)

This contract shall not be deemed valid until it has been approved by the Controller of the State of Colorado or such assistant as he may designate.

2. FUND AVAILABILITY. CRS 24-30-202 (5.5)

Financial obligations of the State of Colorado payable after the current fiscal year are contingent upon funds for that purpose being appropriated, budgeted, and otherwise made available.

3. INDEMNIFICATION.

The Contractor shall indemnify, save, and hold harmless the State, its employees and agents, against any and all claims, damages, liability and court awards including costs, expenses, and attorney fees incurred as a result of any act or omission by the Contractor, or its employees, agents, subcontractors, or assignees pursuant to the terms of this contract.

4. INDEPENDENT CONTRACTOR. 4 CCR 801-2

THE CONTRACTOR SHALL PERFORM ITS DUTIES HEREUNDER AS AN INDEPENDENT CONTRACTOR AND NOT AS AN EMPLOYEE. NEITHER THE CONTRACTOR NOR ANY AGENT OR EMPLOYEE OF THE CONTRACTOR SHALL BE OR SHALL BE DEEMED TO BE AN AGENT OR EMPLOYEE OF THE STATE. CONTRACTOR SHALL PAY WHEN DUE ALL REQUIRED EMPLOYMENT TAXES AND INCOME TAX AND LOCAL HEAD TAX ON ANY MONIES PAID BY THE STATE PURSUANT TO THIS CONTRACT. CONTRACTOR ACKNOWLEDGES THAT THE CONTRACTOR AND ITS EMPLOYEES ARE NOT ENTITLED TO UNEMPLOYMENT INSURANCE BENEFITS UNLESS THE CONTRACTOR OR THIRD PARTY PROVIDES SUCH COVERAGE AND THAT THE STATE DOES NOT PAY FOR OR OTHERWISE PROVIDE SUCH COVERAGE. CONTRACTOR SHALL HAVE NO AUTHORIZATION, EXPRESS OR IMPLIED, TO BIND THE STATE TO ANY AGREEMENTS, LIABILITY, OR UNDERSTANDING EXCEPT AS EXPRESSLY SET FORTH HEREIN. CONTRACTOR SHALL PROVIDE AND KEEP IN FORCE WORKERS' COMPENSATION (AND PROVIDE PROOF OF SUCH INSURANCE WHEN REQUESTED BY THE STATE) AND UNEMPLOYMENT COMPENSATION INSURANCE IN THE AMOUNTS REQUIRED BY LAW, AND SHALL BE SOLELY RESPONSIBLE FOR THE ACTS OF THE CONTRACTOR, ITS EMPLOYEES AND AGENTS.

5. NON-DISCRIMINATION.

The contractor agrees to comply with the letter and the spirit of all applicable state and federal laws respecting discrimination and unfair employment practices.

6. CHOICE OF LAW.

The laws of the State of Colorado and rules and regulations issued pursuant thereto shall be applied in the interpretation, execution, and enforcement of this contract. Any provision of this contract, whether or not incorporated herein by reference, which provides for arbitration by any extra-judicial body or person or which is otherwise in conflict with said laws, rules, and regulations shall be considered null and void. Nothing contained in any provision incorporated herein by reference which purports to negate this or any other special provision in whole or in part shall be valid or enforceable or available in any action at law whether by way of complaint, defense, or otherwise. Any provision rendered null and void by the operation of this provision will not invalidate the remainder of this contract to the extent that the contract is capable of execution.

At all times during the performance of this contract, the Contractor shall strictly adhere to all applicable federal and State laws, rules, and regulations that have been or may hereafter be established.

7. VENDOR OFFSET. CRS 24-30-202 (1) & CRS 24-30-202.4

Pursuant to CRS 24-30-202.4 (as amended), the State Controller may withhold debts owed to State agencies under the vendor offset intercept system for: (a) unpaid child support debt or child support arrearages; (b) unpaid balance of tax, accrued interest, or other charges specified in Article 21, Title 39, CRS; (c) unpaid loans due to the Student Loan Division of the Department of Higher Education; (d) owed amounts required to be paid to the Unemployment Compensation Fund; and (e) other unpaid debts owing to the State or any agency thereof, the amount of which is found to be owing as a result of final agency determination or reduced to judgment as certified by the controller.

8. SOFTWARE PIRACY PROHIBITION Governor's Executive Order D 002 00

No State or other public funds payable under this Contract shall be used for the acquisition, operation, or maintenance of computer software in violation of United States copyright laws or applicable licensing restrictions. The Contractor hereby certifies that, for the term of this Contract and any extensions, the Contractor has in place appropriate systems and controls to prevent such improper use of public funds. If the State determines that the Contractor is in violation of this paragraph, the State may exercise any remedy available at law or equity or under this Contract, including, without limitation, immediate termination of the Contract and any remedy consistent with United States copyright laws or applicable licensing restrictions.

9. EMPLOYEE FINANCIAL INTEREST. CRS 24-18-201 & CRS 24-50-507

The signatories aver that to their knowledge, no employee of the State of Colorado has any personal or beneficial interest whatsoever in the service or property described herein.

Effective Date: April 1, 2004

SPECIAL PROVISIONS

(For Use Only with Inter-Governmental Contracts)

1. CONTROLLER'S APPROVAL. CRS 24-30-202 (1)

This contract shall not be deemed valid until it has been approved by the Controller of the State of Colorado or such assistant as he may designate.

2. FUND AVAILABILITY. CRS 24-30-202 (5.5)

Financial obligations of the State of Colorado payable after the current fiscal year are contingent upon funds for that purpose being appropriated, budgeted, and otherwise made available.

3. INDEMNIFICATION.

To the extent authorized by law, the contractor shall indemnify, save, and hold harmless the State against any and all claims, damages, liability and court awards including costs, expenses, and attorney fees incurred as a result of any act or omission by the Contractor, or its employees, agents, subcontractors, or assignees pursuant to the terms of this contract.

No term or condition of this contract shall be construed or interpreted as a waiver, express or implied, of any of the immunities, rights, benefits, protection, or other provisions for the parties, of the Colorado Governmental Immunity Act, CRS 24-10-101 et seq. or the Federal Tort Claims Act, 28 U.S.C. 2671 et seq. as applicable, as now or hereafter amended.

4. INDEPENDENT CONTRACTOR. 4 CCR 801-2

THE CONTRACTOR SHALL PERFORM ITS DUTIES HEREUNDER AS AN INDEPENDENT CONTRACTOR AND NOT AS AN EMPLOYEE. NEITHER THE CONTRACTOR NOR ANY AGENT OR EMPLOYEE OF THE CONTRACTOR SHALL BE OR SHALL BE DEEMED TO BE AN AGENT OR EMPLOYEE OF THE STATE. CONTRACTOR SHALL PAY WHEN DUE ALL REQUIRED EMPLOYMENT TAXES AND INCOME TAX AND LOCAL HEAD TAX ON ANY MONIES PAID BY THE STATE PURSUANT TO THIS CONTRACT. CONTRACTOR ACKNOWLEDGES THAT THE CONTRACTOR AND ITS EMPLOYEES ARE NOT ENTITLED TO UNEMPLOYMENT INSURANCE BENEFITS UNLESS THE CONTRACTOR OR THIRD PARTY PROVIDES SUCH COVERAGE AND THAT THE STATE DOES NOT PAY FOR OR OTHERWISE PROVIDE SUCH COVERAGE. CONTRACTOR SHALL HAVE NO AUTHORIZATION, EXPRESS OR IMPLIED, TO BIND THE STATE TO ANY AGREEMENTS, LIABILITY, OR UNDERSTANDING EXCEPT AS EXPRESSLY SET FORTH HEREIN. CONTRACTOR SHALL PROVIDE AND KEEP IN FORCE WORKERS' COMPENSATION (AND PROVIDE PROOF OF SUCH INSURANCE WHEN REQUESTED BY THE STATE) AND UNEMPLOYMENT COMPENSATION INSURANCE IN THE AMOUNTS REQUIRED BY LAW, AND SHALL BE SOLELY RESPONSIBLE FOR THE ACTS OF THE CONTRACTOR, ITS EMPLOYEES AND AGENTS.

5. NON-DISCRIMINATION.

The contractor agrees to comply with the letter and the spirit of all applicable state and federal laws respecting discrimination and unfair employment practices.

6. CHOICE OF LAW

The laws of the State of Colorado and rules and regulations issued pursuant thereto shall be applied in the interpretation, execution, and enforcement of this contract. Any provision of this contract, whether or not incorporated herein by reference, which provides for arbitration by any extra-judicial body or person or which is otherwise in conflict with said laws, rules, and regulations shall be considered null and void. Nothing contained in any provision incorporated herein by reference which purports to negate this or any other special provision in whole or in part shall be valid or enforceable or available in any action at law whether by way of complaint, defense, or otherwise. Any provision rendered null and void by the operation of this provision will not invalidate the remainder of this contract to the extent that the contract is capable of execution.

At all times during the performance of this contract, the Contractor shall strictly adhere to all applicable federal and state laws, rules, and regulations that have been or may hereafter be established.

7. SOFTWARE PIRACY PROHIBITION Governor's Executive Order D 002 00

No State or other public funds payable under this Contract shall be used for the acquisition, operation, or maintenance of computer software in violation of United States copyright laws or applicable licensing restrictions. The Contractor hereby certifies that, for the term of this Contract and any extensions, the Contractor has in place appropriate systems and controls to prevent such improper use of public funds. If the State determines that the Contractor is in violation of this paragraph, the State may exercise any remedy available at law or equity or under this Contract, including, without limitation, immediate termination of the Contract and any remedy consistent with United States copyright laws or applicable licensing restrictions.

8. EMPLOYEE FINANCIAL INTEREST. CRS 24-18-201 & CRS 24-50-507

The signatories aver that to their knowledge, no employee of the State of Colorado has any personal or beneficial interest whatsoever in the service or property described herein.

Effective Date: April 1, 2004

SIGNATURE PAGE

THE PARTIES HERETO HAVE EXECUTED THIS CONTRACT

CONTRACTOR:

STATE OF COLORADO:

GOVERNOR

Legal Name of Contracting Entity

By _____
Executive Director

Social Security Number or FEIN

Department of _____

Signature of Authorized Officer

LEGAL REVIEW:

ATTORNEY GENERAL

Print Name & Title of Authorized Officer

By _____

CORPORATIONS:
(A corporate attestation is required.)

Attest (Seal) By _____
(Corporate Secretary or Equivalent, or Town/City/County Clerk) (Place corporate seal here, if available)

ALL CONTRACTS MUST BE APPROVED BY THE STATE CONTROLLER

CRS 24-30-202 requires that the State Controller approve all state contracts. This contract is not valid until the State Controller, or such assistant as he may delegate, has signed it. The contractor is not authorized to begin performance until the contract is signed and dated below. If performance begins prior to the date below, the State of Colorado may not be obligated to pay for the goods and/or services provided.

STATE CONTROLLER:

By _____

Date _____